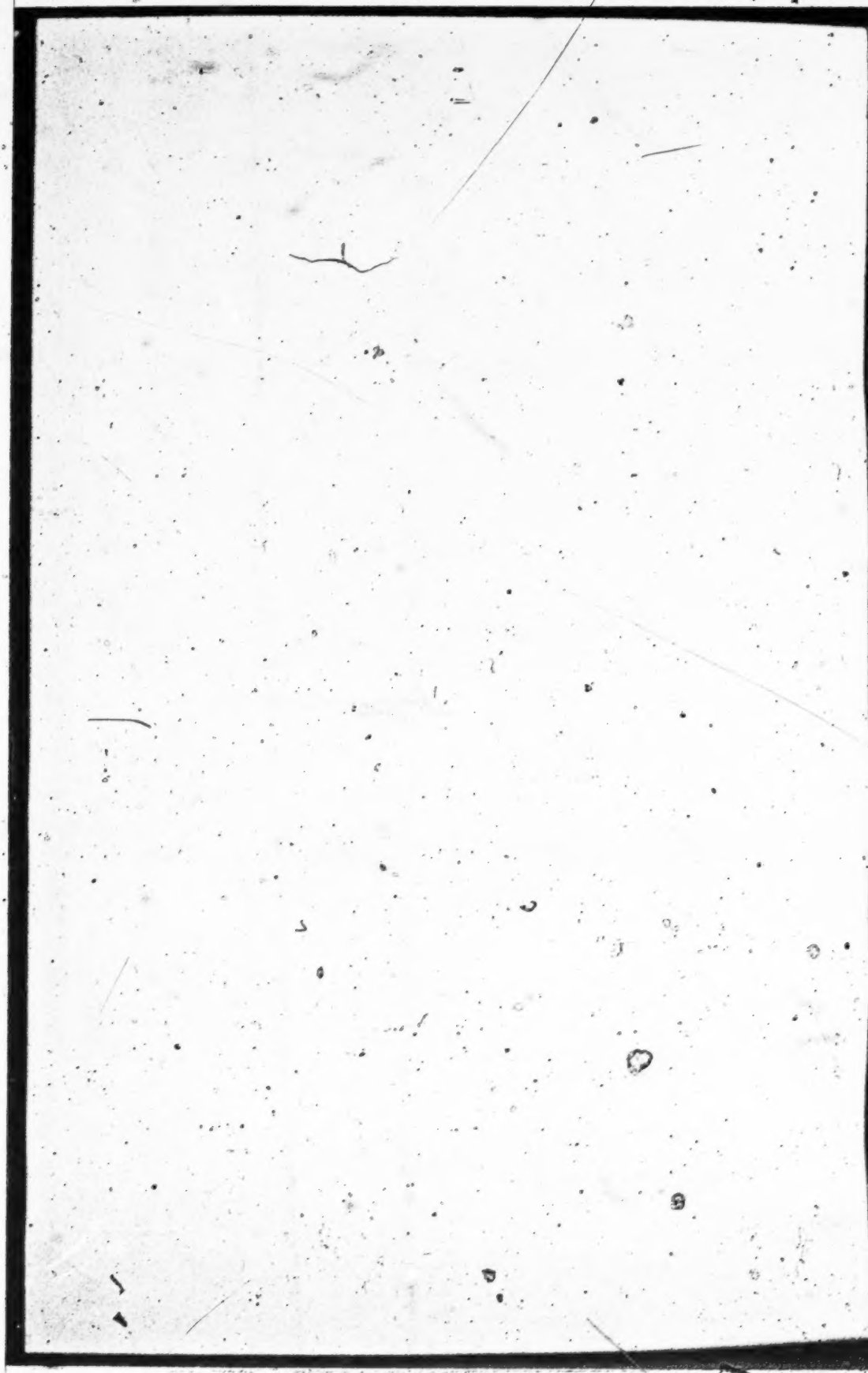

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Single Appendix and BRIEF FOR JACK FREDERICK McKART

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CITATIONS TO THE OPINIONS BELOW

The opinion of the court of appeals (A.) is reported at 395 F 2d 906. The opinion of the district court is unreported (A.).

JURISDICTION

The opinion and judgment of the court of appeals was filed and entered on June 14, 1968. On July 9, 1968, Mr. Justice

White extended the time for filing the petition for a writ of certiorari to August 13, 1968. The Petition was filed on August 13, 1968, and was granted on October 28, 1968 (A. 60). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A, sole surviving son, exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

(2) Does a Selective Service registrant lose his IV-A classification as the sole surviving son of a family whose father was killed in World War II upon the death of his mother, no other children having been born to the family?

STATUTES INVOLVED

50 U.S.C. App. § 456(o) provides:

"(o) Except during the period of a war or a national emergency declared by the Congress after the date of the enactment of the 1964 amendment to this subsection [July 7, 1964], where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service, the sole surviving son of such family

shall not be inducted for service under the terms of this title [sections 451-454 and 455-471 of this Appendix] unless he volunteers for induction."

50 U.S.C. App. § 462(a) provides in material part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules and regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty...shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by such fine and imprisonment. ..."

STATEMENT OF THE CASE

The Petitioner, Jack Frederick McKart, was indicted under a charge of violating the Universal Military Training and Service Act (50 U.S.C. App. § 462), the indictment alleging that he willfully and knowingly failed to comply with an order of his draft board to report for and to submit to induction into the Armed Forces of the United States on April 21, 1966 (A. 3). He pleaded not guilty and was tried without a jury by the court. On May 16, 1967, the Petitioner was found guilty and subsequently sentenced to three years in jail (A.1 and 2).

The facts of the case are not in dispute. The Petitioner, who was born on February 13, 1943, (A. 40), was classified I-A on February 26, 1963 (A. 4). On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote to the board stating that as a matter of conscience he could not assist the Selective Service System (A. 4 and 17 - 18).

The draft board then sent him forms to be filled out if he sought a conscientious objector classification. It further noted that he might be eligible for a IV-A classification as being the sole surviving son of a family which had its father killed in the Armed Services (A. 4). In response thereto, the Petitioner refused to make application for a conscientious objector classification but wrote that his "Father was killed in the second World War.". (A. 20 to 24). His draft board cancelled the induction order and classified him IV-A on July 27, 1964, as being a sole sur-

viving son. (A. 5).

On January 30, 1966, the Petitioner's mother died (A. 16). The Petitioner was the sole child of that marriage (A. 11). On February 14, 1966, the draft board, after consultation with state authorities of the Selective Service System, reclassified the Petitioner I-A (A. 12). Although he was a sole surviving son, it was Selective Service's position that there was no longer "any family" (A. 12). After he was reclassified I-A, the Petitioner failed to appeal the reclassification and failed to appear for his April 12, 1966, induction (A. 5).

The trial judge refused to pass on the issue of whether the Petitioner was entitled to a continuance of his IV-A classification, because of the failure of the Petitioner to appeal his c assification on February 14, 1966. The Court decided that Petitioner's conduct constituted a waiver of any rights to a IV-A classification and a failure to exhaust his administrative remedies. (A. 45).

The Petitioner was sentenced to three years imprisonment. He appealled. (A. 1 and 2). The Court of Appeals for the Sixth Circuit affirmed the trial court (opinion by Phillips, J.) with one judge dissenting (Celebrezze, J.) (A. 49 to 58).

The Court of Appeals held that, as the Petitioner had "not appealed his classification through the Selective Service procedures", he could not, in a trial for failure to submit to induction into

the Armed Forces, "raise the defense, upon *wholly undisputed facts*, that he was wrongfully classified in violation of the statute." (A. 52) (emphasis added).

Judge Celebrezze, in dissent, concluded that "the board's order of induction was not 'pursuant to' the /Selective Service/ Act but in contravention of the Act" and that "therefore...regardless of how much he /Petitioner/ tried, and perhaps even wanted, to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried." Judge Celebrezze also states:

> "This is not a case where the existence of the exemption depends upon the board's first making a factual determination. Here the board had already determined that the Defendant was entitled to the exemption; the termination of the exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.
>
> I would reverse and dismiss the indictment." (A. 57 and 58).

SUMMARY OF ARGUMENT

The application of the doctrine of exhaustion of administrative remedies is inappropriate in Petitioner's case because:

(a) Administrative remedies constituted a futile and empty formality; and

(b) The issue involved is purely one of law or statutory interpretation.

The position of the Selective Service System on the meaning of § 456(o) of Title 50 App., (sole surviving son exemption) was well established. Exhaustion of administrative remedies would have been futile. For that reason, exhaustion is not required.

In addition, the issue involved is solely one of law or statutory construction. The Selective Service System erroneously construed applicable law in reclassifying Petitioner and ordering him to report for induction. In doing so, it violated a statutory prohibition.

This Court has, in the past, granted judicial relief to persons who have been injured by an act of a government official in excess of his powers. A failure to exhaust administrative remedies has not barred such relief when an agency clearly violated a statutory right of a party. It should not do so here.

Petitioner was reclassified from IV-A to I-A on the basis of an erroneous interpretation of 50 U.S.C. App., § 456 (o). The Selective Service System maintains that Petitioner lost his right to a IV-A exemption upon the death of his mother. It bases this position on the

fact that Petitioner no longer has any immediate family of which he is the survivor.

Further, an analysis of the purposes of the section or the legislative history of the section do not reveal that Congress intended such a requirement.

ARGUMENT

I. THE APPLICATION OF THE DOCTRINE OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES IS INAPPROPRIATE IN PETITIONER'S CASE BECAUSE:

(A) ADMINISTRATIVE REMEDIES CONSTITUTED A FUTILE AND EMPTY FORMALITY;

AND,

(B) THE ISSUE INVOLVED IS PURELY ONE OF LAW OR STATUTORY INTERPRETATION.

(A) ADMINISTRATIVE REMEDIES CONSTITUTE A FUTILE AND EMPTY FORMALITY.

There were no questions of credibility or factual dispute to be resolved by an administrative agency in Petitioner's case and the position of the Selective Service System on the significance of his mother's death was well established; namely, that because of it, no family existed of which Petitioner could be the sole surviving son. Thus, he was no longer entitled to his IV-A exemption.

When the sole surviving son amendment was passed by Congress in 1964, Selective Service took the position that no change in the status of the registrant's

family would cause a loss of the exemption unless there was the birth of a full brother (A. 33). This was withdrawn in September, 1964 (A. 34). At Petitioner's trial, the Clerk of the Local Board testified that he was reclassified I-A because "Selective Service headquarters in Columbus" (determined) "that he no longer qualified" (for IV-A) "because the family unit ceased to exist" (A. 64).

The State Headquarters wrote to the National Director on May 10, 1966, requesting advice on the situation. The National Headquarters responded by letter dated June 13, 1966. "Inasmuch as there is no family, it is not believed that he qualified for sole surviving son status." This information was then communicated to Petitioner's local board (A. 64 - 66).

Thus, an appeal to the Selective Service System would have accomplished nothing for the Petitioner. Its position was clear and established.

Where exhaustion of administrative remedies would be a fruitless and empty formality, exhaustion is not required. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Skinner and Eddy Corp. v. U.S.*, 249 U.S. 557 (1919); *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (CA 2d, 1967) and *Glover v. U.S.* 286 F. 2d 84 (CA 8th, 1961). Also see 2 AMERICAN JURISPRUDENCE 2d, p. 441:

> "Where it plainly appears that the administrative remedy would be of no value and fruitless, the party seeking judicial relief does not

have to complete administrative procedure before resorting to the courts, particularly where the administrative agency is powerless to afford relief...under the rules and regulations as promulgated by the head of the department..."

(B) THE ISSUE INVOLVED IS PURELY ONE OF LAW OR STATUTORY INTERPRETATION.

The issue here is solely one of law or statutory construction. The Court of Appeals for the Sixth Circuit concluded that the facts were "wholly undisputed."

The Selective Service System erroneously construed the law in Petitioner's case and upon the erroneous construction reclassified Petitioner I-A and ordered him to report for induction. This course of action was completely outside the jurisdictional power of Selective Service. § 456(o) of Title 50, App., provides that "...the sole surviving son of such family (the father of which was killed in action) *shall not* be inducted ..." (emphasis added). Yet Petitioner's draft board acted in clear violation of the above statute in reclassifying him I-A and in ordering him to report for induction.

The Court has, in the past, granted judicial relief to those who have been injured by an act of a government official which is in excess of his express or implied powers. *Harmon v. Brucker*, 355 U.S. 579 (1958); *Stark v. Wickard*, 321 U.S. 288 (1944); *American School v.*

McAnnulty, 187 U.S. 94 (1902).

As this Court stated in the American School case:

> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *American School v. McAnnulty*, 187 U.S. 94, 109, 110 (1902).

When an administrative agency has clearly violated a statutory right of a party, by misconstruing the statute, the exhaustion of administrative remedies is not required. *Skinner and Eddy Corp. v. United States*, 249 U.S. 557 (1919); and *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

In *N.L.R.B. v. Highland Park Mfg. Co.* 341 U.S. 322 (1951), this Court refused to allow the question of standing to bar its review of an order which was totally invalid, prohibited by law, and beyond the jurisdiction of the N.L.R.B.:

"It would be strange indeed if the courts were compelled to enforce, without inquiry, an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U.S. at 325 - 236.

For the same reasons, the Courts cannot allow an invalid Selective Service order, based solely on an erroneous interpretation of law, to go unreviewed simply because of a failure to exhaust administrative remedies.

On the same basis, the Courts of Appeals and the District Courts have applied this principle when the doctrine of exhaustion of administrative remedies has been used in an attempt to bar consideration of a pure question of law where there is no factual dispute:

"The District Court is not an appellate court for reviewing draft board decisions. In cases involving disputed factual findings the scope of review is quite narrow, and there

in any basis in fact for the decision of the Board, a registrant's failure to appeal that decision would prevent his attacking it in the courts. However, there is no factual dispute here. The only question, on the basis of the file and stipulation, is whether the undisputed facts entitle the defendant to a I-O classification. The experience of the administrative boards and agencies will generally render them better equipped than the courts to solve factual problems within their respective fields, but, as stated in *Wills v. U.S.*, 384 F.2d 943, where the dispute is on a question of law, 'the exhaustion rule loses much of its force...'" *UNITED STATES v. Carson*, 282 F.Supp. 261, 271 (1968).

In recent cases, the Courts of Appeals have followed this position under similar circumstances. *Wills v. United States*, 384 F.2d 943 (1967) CA9; and *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (CA 2d, 1967).

In *Wolff*, at page 826, Judge Medina stated:

"...it has in the past been suggested when a local board acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction, the courts may intervene *at any time* to rectify the situation. Thus in *Schwartz v. Strauss*, 206 F.2d 767 (2 Cir. 1953), Judge Frank remarked that he had no doubt that a court would have jurisdiction to review a classification where on undisputed facts the board's lack of

jurisdiction was manifest. On the merits, however, he found that the board had acted properly as a matter of law. And in *Townsend v. Zimmerman*, 237 F.2d 376 (6 Cir. 1956), Judge Stewart, now Justice Stewart, enjoined a threatened induction when it appeared clearly as a matter of law that the board had violated the regulations in issuing the order." (Emphasis added).

As has been shown above, the courts have enjoined actions of administrative agencies, including the Selective Service System, when said actions were clearly in violation of applicable law. However, the Petitioner does not seek to enjoin the Selective Service System. Rather, he seeks only to point out in his own defense that his reclassification and subsequent induction order were in violation of an explicit statutory prohibition. The right of a person to point out a clear violation of a statutory command by an agency, should be at least as broad in a criminal proceeding as it is in an injunctive proceeding.

The refusal on the part of the trial and appellate courts to allow Petitioner to present his defense has permitted an invalid Selective Service Order to go unreviewed by the courts; and Petitioner has been sentenced to three years in prison for his refusal to obey that invalid order.

The Sixth Circuit Court of Appeals relied upon *Falbo v. United States*, 320 U.S. 549 (1944) as interpreted by *Estep*

v. United States, 327 U.S. 114 (1946) to preclude Petitioner from questioning the validity of his Selective Service order because of failure to exhaust his administrative remedies (A. 49 to 58). Petitioner maintains that *Falbo* and *Estep* are not relevant in this matter, because they involved factual determinations by local boards within the competency and jurisdiction of those boards. In those cases there was no question that the boards had the authority to resolve the facts in dispute.

Falbo and *Estep*, together, determined the point in administrative process to which the registrant had to bring himself in order to challenge the factual basis of his classification. *Estep*, in addition, set out the "basis in fact" rule as the standard for judging a local board's exercise of jurisdiction in making factual determinations. *Estep v. United States*, 327 U.S. 114, 122, 123 (1946). However, neither case involved a registrant who claimed his local board violated a statutory prohibition in reclassifying him and ordering him to report for induction.

In the present case there is no dispute of fact and the issue is purely one of law, which the courts are equally as competent, if not more competent, to determine. In fact, it is the duty of the courts to review an erroneous interpretation of Selective Service. With no factual dispute and with a pure issue of law, the doctrine of the exhaustion of administrative remedies as enunciated in *Falbo* and *Estep* simply does not apply.

II. A REGISTRANT WHO IS PROPERLY CLASSIFIED IV-A AS A SOLE SURVIVING SON OF A FAMILY WHOSE FATHER WAS KILLED IN WORLD WAR II DOES NOT LOSE HIS RIGHT TO THAT CLASSIFICATION UPON THE DEATH OF HIS MOTHER, NO OTHER CHILDREN HAVING BEEN BORN TO THE FAMILY.

The question of whether a registrant loses a Selective Service Classification of IV-A, which he received because of the death of his father in combat, upon the death of his mother, leaving no other children in the family, is one of first impression. Counsel for Petitioner have been unable to find any decisions discussing this question. The trial court and the court of appeals found that there was no need to discuss the issue (A. 49 to 58).

The statute (50 U.S.C. App. § 456(o) provides in pertinent part as follows:

"Where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces..., the sole surviving son of such family shall not be inducted for service..."

Petitioner maintains that he is entitled to the exemption as a sole surviving son by reason of the death of his father during World War II and the subsequent death of his mother did not deprive him of the right to that exemption.

Selective Service insists that the right to the exemption ceases when there are no parents or sisters living, be-

cause there is no "family" left. (A. I2).

This position is not supported by an analysis of the words of the statute or the purposes of the statute.

§ 456(o) provides only three conditions upon which the right to the exemption may terminate. A sole surviving son may be drafted only if there is a declaration of war, a declaration of national emergency or he volunteers for service. An obvious, but unwritten and unstated condition, is that the right to the exemption terminates when a second son is born in the family. Congress would have provided explicitly that a IV-A classification terminate with no family remaining, if it so intended. § 456 (o) does not.

This omission in §456(o) has great significance in determining the intent of Congress, if that section is compared with 50 U.S.C. App. §456(h). §456(h) provides that registrants with children and a wife, "with whom they maintain a bona fide *family relationship in their homes*" (emphasis added) are entitled to a III-A or a hardship deferment. In this latter section, Congress clearly set forth that the family relationship exist as a pre-condition for a III-A classification. The absence of a similar condition in §456(o) can only mean that Congress did not intend a similar precondition for a IV-A classification.

The Selective Service System insists that the only purpose of this exemption is to spare the sole surviving son to

comfort and support the remaining members of the family (A.34 and 35). While the Petitioner agrees that this is one purpose, he would maintain it is not the only one. Certainly, one purpose is to leave a male heir to carry on the name of the family. It would be of little comfort to the family to know that the sole surviving son could be inducted and possibly killed, thus cutting off the family name.

Another purpose of this exemption is to spare all members of the family, including the sole surviving son, of any more pain and suffering which might be caused by military service. Finally, this exemption has the purpose of relieving the family of any further military duty, because it has already borne more than its share of civic responsibility in the common defense. If this exemption has these multiple purposes, then Petitioner remained entitled to his IV-A classification upon the death of his mother.

If the sole purpose of this section is to spare the sole surviving son to comfort the remaining members of the family, then it ought to require that he live with them and financially support them. The section contains no such requirement and the Selective Service System has never set forth such a requirement.

The Selective Service System originally adopted the position of Petitioner in Operations Bulletin No. 263 (A. 34 and 33):

"...3. Whenever a registrant has become qualified for exemption as a sole surviving son under 6(c) he should not thereafter be deemed to have lost his right to the exemption by reason of any subsequent change in the status of his family other than the birth of a full brother who is living..."

This Bulletin was later rescinded and no other instructions have been issued by the Selective Service System concerning this section (A. 34 and 35).

This recision was apparently based upon the remarks of Representative Huber, at the time of the original sole surviving son amendment enactment in 1948 (A. 35):

"But under these circumstances, while we are still at peace, I see no reason why we cannot allow these parents who made so costly a sacrifice to have the solace and consolation of having their one remaining son at their side to carry on the family name..." 1964 U.S. Code, Congressional and Administrative News, Volume 2, page 2540.

Petitioner points out that this statement by Representative Huber supports his interpretation of §456(c). The Congressman obviously had in mind that the section would serve the purpose of insuring that the family name would be carried on and the purpose of relieving the family of any further sacrifice. Neither purpose to be fulfilled requires that the immediate family remain alive. The legislative history of the 1964 amendment to

§456(o) makes no mention of the necessity of the existence of a family for obtaining the exemption (pp.A3 and 4).

Apart from the failure of the legislative history to support the interpretation of the Selective Service System, legislative history should not be used in contradiction of the clear meaning of the statute:

> "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous..." Justice Jackson, concurring in *Schwegmann Bros. v. Calvert Distilleries Corp.* 341 U.S. 384, at 396.

A reading of §456(o) reveals that it is anything but "inescapably ambiguous."

Petitioner respectfully submits that the analysis and history of §456(o) demonstrates that the interpretation of the Selective Service System was erroneous and the reclassification of Petitioner from IV-A to I-A was arbitrary and capricious.

CONCLUSION

For the reasons heretofore set forth, Petitioner prays that the judgment of the District Court be reversed and that the indictment be dismissed.

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APPENDIX

In The

Supreme Court of the United States

October Term, 1968

NO. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 13, 1968

CERTIORARI GRANTED OCTOBER 28, 1968

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PETITIONER'S APPENDIX

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
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Plaintiff,	)	Indictment
	)	Number
v.	)	11,122
	)	
JACK FREDERICK McKART,	)	
	)	
Defendant.	)	

RELEVANT DOCKET ENTRIES

Nov. 22, 1966	Indictment filed.
Feb. 16, 1967	Case called for Arraignment-Def. appeared in court and represented by counsel Def. arraigned-Plea of Not Guilty entered Continued-Trial date is to be set.
Ap. 27, 1967	Jury Waiver filed by Def.
Ap. 27, 1967	Trial to Court-Def. present with counsel Opening statements waived-Pltf requested continuance-Argued Withdrawn. Testimony

	for Pltf begun and concluded. Deft voir dired witnesses and made Motion to Dismiss Indictment-Argued Reserved for consideration. Submitted on Motion and Merits for a directed Verdict.
May 16, 1967	GENERAL FINDING, filed by J. Porter-Deft. GUILTY as charged. Copies to Counsel.
May 16, 1967	MEMORANDUM OF DECISION, filed by J. Porter-Copies to Counsel.
May 25, 1967	Case called for sentencing-Deft. here with Counsel-cause cont. for pre-sentencing Investigation OR Bond cont.
June 22, 1967	Case called for sent. Deft. here with Counsel-sent. 3 yrs. impr. with stay of execution for time necessary pending Appeal-$1,000 OR Bond set, Deft. may go to Chicago while out on Bond-Issued, USM
June 28, 1967	NOTICE OF APPEAL, filed by Deft.-Issued 6th Circuit Ct. of Appeals.
Aug. 25, 1967	Excerpts of Pro-

ceedings (All Test. & Closing Argument of Deft.)filed by Court Reporter

= = = = =

INDICTMENT

(Title omitted in printing.)

The Grand Jury charges:

That on or about the 21st of April, 1966, in the Southern District of Ohio, Western Division, at Hamilton Ohio, JACK FREDERICK McKART wilfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations, and directions duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the Armed Forces of the United States.

In violation of Title 50 App., Section 462, United States Code.

A true bill.

/s/ Paul Brogan
FOREMAN

ROBERT M. DRAPER
United States Attorney

/s/ Charles G. Heyd
CHARLES G. HEYD
First Ass't. United States Attny.

MINUTES OF LOCAL BOARD MEETINGS

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote	
		Yes	No
1/9/63	SSS Form 127 Mailed		
2/4/63	SSS Form 127 mailed to registrant		
2/25/63	Classified 1A RHW	2	0
2/26 63	SSS Form 110 mailed to registrant		
11/13 63	SSS Form 127 mailed to registrant		
3/9/64	SSS Form 127 mailed		
3/23 64	SSS Form 223 mailed registrant to report 4/21/64		
4/21 64	Failed to report for PIPE		
4/27 64	Delinquent EA ERBS	2	0
4/28 64	SSS Form 304 (Notice of Delinquency) mailed to registrant		
5/1/64	SSS Form 252 mailed to registrant. To report 5/11/64		
5/11 64	Failed to report for induction. Received Special Delivery letter from registrant, stating he refuses to report for induction or to serve the country unarmed by doing alternative service. Letter to Registrant requesting information relative to claim of "Sole Surviving Son", SSS 150, Spec.		

	Form for C.O. mailed		
5/21 64	SSS Form 150 returned, registrant declines to complete. Letter from registrant indicates his father was killed in second World War, but he gives no other information.		
6/8/64	Reviewed RHW	2	0
7/1/64	State Director requested, per 1625.3 that this registrant's classification be reopened and considered anew.		
7/27 64	Reviewed, reopened, classified 4-A and induction cancelled. EA ERBS	3	0
7/28 64	SSS Form 110 mailed registrant and mimeo 03-187		
2/14 66	SSS Form 127 mailed registrant		
2/14 66	Classified 1A RHW	3	0
2/15 66	SSS Form 110 mailed registrant		
2/24 66	SSS Form 223 mailed registrant to report 3/17/66		
3/17 66	Failed to report for PIPE		
3/21 66	Delinquent EA ERBS	3	0
3/22 66	SSS Form 304 mailed to registrant		
3/31 66	SSS Form 252 mailed to registrant to report 4/21/66		
4/21 66	Failed to report for induction.		

6/24 66	SSS form 301 mailed to U.S. Attorney		
11/22 66	File to State Headquarters per request Col. Russell		

EXCERPTS FROM TESTIMONY
OF EVELYN C. JUNKIN

TAKEN FROM THE RECORD OF PROCEEDINGS

(Filed April 26, 1967)

* * * * * * *

Q. Mrs. Junkin, do the records of Local Board number 9 indicates when Jack Frederick McKart registered with the Selective Service System?

A. Yes, sir.

Q. And what do the records show as to the date that he registered with Selective Service?

A. He registered February 17, 1961.

* * * * * * *

Q. Did the registrant Jack F. McKart subsequently receive a classification from Local Board number 9?

A. Yes, he did.

Q. On what date, ma'am?

A. Form 110, notice of classification, was mailed to him on February the 26th, 1963.

Q. And on what date had the Board assigned him that classification?

A. On February the 25th, 1963.

Q. And what classification did the registrant Jack F. McKart receive on February 25, 1963?

A. Classified I-A.

(Thereupon, a "Selective Service System Notice of Classification," SSS Form 110, was marked Plaintiff's Exhibit No. 2 for identification.)

Q. I will ask you whether the notice was furnished him at that time contained in addition to the information that he had been placed in Class I-A, information concerning the right to appeal that classification and the means of accomplishing that appeal.

A. Yes, sir.

* * * * * * *

Q. Did the registrant Jack McKart subsequent to February 25th or 26th, 1963 appeal the I-A classification which was given him at that time?

A. No sir.

Q. Subsequent to his classification in I-A, on or about February 25th, 1963 what action was taken with respect to this registrant by the local board?

A. Well, in November of '63 we sent him a current information questionnaire to bring his records up to date.

Q. Was that returned?

A. No. And again in March of '64 we sent him a current information questionnaire.

Q. What was the date on which in March of 1964 that the informational

questionnaire was sent?

A. March the 9th.

Q. And do the records of the Board show whether or not that questionnaire was returned?

A. It was not.

Q. What happened after that date with respect to this registrant?

A. Well, on March the 23rd, 1964 he was mailed an SSS Form 223, "Order to report for Armed Forces physical examination," and he was to report on April the 21st, 1964.

Q. Where was he to report?

A. To the Local Board office.

Q. And does the record of the Board indicate whether in fact he did report on April 21st for the purpose of that examination?

A. He did not report.

Q. And subsequent to that time was he ordered to report for induction by the Local Board?

A. Yes, sir.

Q. On what date was he ordered to report for induction?

A. On May the 1st, 1964 he was mailed an SSS Form 252, "Order to report for induction," to report on May the 11th, 1964.

Q. And did he in fact report on May the 11th, 1964 for induction?

A. No, sir.

* * * * * * *

Q. Do the records of Local Board number 9 show whether in fact the registrant Jack Frederick McKart reported on May 11th, 1964 to Local Board number 9 for the purpose of induction?

A. He did not.

* * * * * * *

Q. Now, Mrs. Junkin, calling your attention to the letter received from the registrant which was dated on or about May 21st, 1964, I will ask you to indicate to the Court the substance of that letter.

A. Person states: "I received your letter of May 11 and the Special Form for Conscientious Objector. Apparently my letter of May 10 was not clear. I do not wish to become classified as a conscientious objector. I simply no longer want to have anything to do with the Selective Service System."

Q. O.K. Now, did the form which you had furnished the registrant on or about May 11th, did that accompany his letter of May 21st?

A. It did.

Q. And was it completed?

A. It was not.

Q. And did his letter of May 21st also contain some information in response to your question about his being a sole surviving son?

A. (Examining.) Yes.

Q. And did you subsequent to that time receive additional information from the registrant concerning his possible status as a sole surviving son?

A. Yes. We wrote him a letter and requested the name of the person, date of birth, date of entry into service, grade and rank at time of death, branch of service and any other informttion.

Q. And did he furnish any or all or this information?

A. Yes, sir.

Q. O.K. And subsequent to your receipt of this information was a change made in his classification?

A. Yes, sir.

Q. And on what date was he placed in this classification?

A. July 27th, 1964.

Q. O.K. What disposition, if any, was made of the prior order to report for induction?

A. It was cancelled.

Q. And until what date did the registrant remain in classification IV-A?

A. Until February the 14th, 1966.

Q. And on February the 14th, 1966 into what classification was the registrant placed?

A. Class I-A.

Q. And what was the basis for the change of classification from IV-A to I-A?

A. Information was received that the registrant's mother had passed away, and our Selective Service headquarters in Columbus was contacted to determine if he would still qualify as a sole surviving son; and it was their opinion that he no longer qualified because the family unit ceased to exist.

Q. And was he notified of the change of classification which occured on February 14th, 1966?

A. Yes, sir.

Q. In what manner was he notified, ma'am?

A. Again a notice of classification, SSS Form 110, was mailed to him on the 15th.

Q. And did the form that was mailed to him on February 15th, 1966 concern information concerning his right to appeal and the methods to bring about an appeal?

A. Yes, sir.

Q. And was that information substan-

tially the same as the information that is contained on what's been admitted into evidence as Plaintiff's Exhibit number 2?

A. Yes, sir.

Q. And did he, subsequent to the receipt of that notification, appeal his classification of I-A?

A. No, sir.

* * * * * * *

Q. And I think you have answered this, but He did not appeal, did he?

A. No, sir.

Q. What action was taken with respect to the registrant Jack McKart subsequent to February the 15th, 1966?

A. On February 24th, '66 he was mailed an order to report for preinduction physical examination on March the 17th.

Q. And do the records of the Board indicate whether he did report for that physical?

A. The records indicate he failed to report for preinduction.

Q. Where was he ordered to report?

A. To the Local Board office.

Q. In Hamilton, Ohio?

A. Yes, sir.

Q. And you have indicated he did not

report; is that correct?

A. Yes, sir.

Q. Subsequent to that what action was taken by the Board with respect to this registrant?

A. At the Local Board meeting on March the 21st, 1966 he was declared delinquent for failure to report for induction and notified on the 22nd of March that he was cited as a delinquent.

* * * * * *

Q. All right. And I think you have indicated that subsequent to the receipt of that letter the registrant Jack McKart was ordered for induction; is that correct?

A. Correct.

Q. Was there mailed to him a notice ordering him to report for induction?

A. Notice was mailed on March the 31st, 1966 to report on April the 21st, 1966.

Q. And to where was he to report?

A. To Local Board office, 633 High Street, Hamilton, Ohio for forwarding to an Armed Forces induction station.

Q. And on April 21st, 1966 did the registrant Jack McKart report for induction as so ordered?

A. No sir.

* * * * * *

Q. Did the registrant Jock McKart at any time, according to the records of Local Board number 9, appeal any I-A classification or any classification that he had been given by the Board?

A. There is no evidence of that.

* * * * * * *

EXCERPTS FROM TESTIMONY
OF FREDERICK W. SCHAIBE

TAKEN FROM THE RECORD OF PROCEEDINGS

(Filed April 26, 1967)

* * * * * * *

Q. Mr. Schaibe, just a couple of questions.

During much of Jack McKart's life he lived with his granparents, did he not?

A. Yes, sir.

Q. That is Mr. and Mrs.?

A. Antone Schaibe.

Q. Those granparents are your parents; isn't that correct?

A. Yes. They are still alive.

Q. And both of them are still alive?

A. Uh-huh.

Q. And your sister died in what, January of '66?

A. January 30th, 1966.

* * * * * *

Q. Preston McKart, the father of Jack McKart, had parents as well, sidn't he?

A. Yes.

Q. Preston McKart's mother is still alive, is she not?

A. I understand she is.

Q. Yes.

A. I mean I haven't seen her.

Q. And Preston McKart, that is the father of Jack McKart who is now deceas ed, also has a father that is alive, do does he not?

A. No. I can't answer that.

Q. You don't know?

A. No.

Q. But at least the paternal grandmother of the Defendant Jack McKart is still alive; is that correct, according to your information?

A. To my information, yes.

* * * * * *

CORRESPONDENCE BETWEEN PETITIONER AND LOCAL BOARD NO. 9

(Plaintiff's Exhibit No. 1-A)

171 Michael Ave.
Hamilton, Ohio
May 10, 1964

Selective Service Board No. 9
Butler County
633 High Street
Hamilton, Ohio

Gentlemen:

You have sent me a notice ordering me to report for induction into the armed forces tomorrow morning. (This I refuse to do and these are the reasons why.

I do not believe in killing and I cannot, in conscience, allow myself to be trained to kill, which is what the armed forces trains a person to do. To me it is morally wrong to kill any person for any reason.

The Selective Service System violates this belief of mine, and therefore I refuse to have anything to do with it. From the time I registered I have answered no letter from your office. I only send you this letter as a matter of courtesy to let you know where I stand.

I also object to the fact that the government forces people to serve it by conscripting them. The government has no moral right to do this. Conscription is only another term for slavery. This also is why I haven't tried to be classified as a conscientious objector to do alternative service. The decision as to whe-

ther a person will serve a country, and as to whether he will serve that country armed or unarmed, must be left up to the individual. I refure to serve this country armed, and I refuse to serve it unarmed by doing alternative service.

Further evidence of the unjustness of the Selective Service System and of the government in dealing with individuals is shown in the statement of personal history you sent with the induction notice. You ask race on this form. Why: You ask if I have "ever been a member of the Communist Party U.S.A., or any communist organizations anywhere." And you ask other questions about my associations with other organizations and with people. To these questions I answer: This is none of your business. No agency of the government and no representative of the government has any right to ask me questions of this nature.

What I have written so far should let you know where I stand. Yes, I am guilty of breaking your law (the Universal Military Tra ning and Service Act, as you call it), but at the same time I am also guilty of not wanting to kill other human beings. Had you lived in Germany of the 1930's, would you have so unquestionably and blindly obeyed Hitler's laws as you blindly obey this unjust conscription law?

You want me to be a murderer for the state. This I refuse to do.

Sincerely,

/s/ Jack McKart

A. 18

(Exhibit page 17.)

Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio

45011

May 11, 1964 33-9-43-86

Jack Frederick McKart
320 N. 9th St.
Hamilton, Ohio

Dear Sir:

After receiving your letter of May 10th we again reviewed your file.

At the time you completed your Questionnaire you gave no information to indicate your feeling about serving your Country.

We request you complete and return the attached form, or return it with a statement declining to complete it.

Further, we note you completed Series XIII, Sole Surviving Son to indicate you are the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

You gave no information to indicate who was lost in service. We request the serial number, place and cause of death of the brother or sister. If the one lost in service was your father, we will appreciate the same information.

By Direction of

Local Board No. 9
Butler County, Ohio

Evelyn C. Junkin
Clerk

Encl.

(Exhibit pages 18-19)

171 Michael Avenue
Hamilton, Ohio
May 20, 1964

Selective Service Board No. 9
Butler County
633 High Street
Hamilton, Ohio

Gentlemen:

I received your letter of May 11 and the Special Form for Conscientious Objector. Apparently my letter of May 10 was not clear to you. I do not wish to become classified as a conscientious objector and I said so in my previous letter. I simply no longer want to have anything to do with the Selective Service System.

Did you send this form thinking I would reconsider and back down, and violate my beliefs? I am as opposed to the government (any government) "drafting" people, whether for the armed forces or for civiliam service, as I am to killing. It must be left up to the individual to decide how he will serve his government, if he is going to serve it at all.

Maybe you aren't aware of what Daniel

Webster, the American statesman, said in the U.S. House of Representatives on January 14, 1814. In case you aren't familiar with this speech, this is what Mr. Webster said:

"Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children, and compel them to fight the battle of any war in which the folly or wickedness of the government may engage itself?

"Under what concealment has this power lain hidden, which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest right of personal liberty? Who will show me any Constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, whenever the purposes of an ambitious and mischevious government may require it?

"I almost disdain to go to quotations and references to prove that such an abominable doctrine has no foundation in the Constitution of this country. It is enough to know that that instrument was intended as the basis of a free government, and that the power contended for is incompatible with any notion of personal liberty.

"A free govennment with an uncontrolled power of military conscription, is the most ridiculous and abominable contradiction and nonsense that ever

entered into the head of men."

Even though these words were spoken 150 years ago, they still have meaning.

But beyond this issue of conscription, let us consider what this conscription is for: to be trained to kill human beings. In the two world wars and the Korean war, nearly 69 million people were killed. You would think that today we are civilized enough and have learned to end forever this slaughter of one another. But here you are, sending me notices "ordering" (no one even asked how I felt about it) me to be trained to kill some other young guy who is probably a lot like myself. We both share in common many things - we're both young, we're eager, we have a whole lifetime ahead of us and we want to live it. But the leaders of the countries we live in cannot get along with each other, so they order us to kill each other. And these leaders who order this mass killing, and are responsible for it, become heroes in the eyes of the people and they have fooled the people into respecting them. And yet, if some able worker is laid off his job and can't find work, and then robs in order to feed his family, he is accused of being shiftless and no-good, and he is jailed. He robbed someone of food or money to buy food for his wife and children, and for this people look upon him as being the lowliest creature on earth. And the leaders of a warring country rob that country of the lives of young men so that they can stay in power, and people look upon these leaders as being the noblest creatures on earth. What hypocrisy!

Yes you would think we would have learned by now, but it is evident we haven't. More people, though, are shaking this notion that the government has brainwashed into us, that war and killing and conscription are necessary. Max Born, the Nobel Prize winning physicist, recently stated it this way:

> "Whoever still believes in war as a legitimate instrument of politics and clings to the traditional ideas of a hero's death for sake of wife and child and defense of the homeland should now realize that these are fairy tales and not nice ones at that."

In your letter you say: "At the time you completed your Questionnaire you gave no information to indicate your feeling about serving your Country." Is this so strange? That was over three years ago, and in three years a person is capable of developing in his thinking. On my 18th birthday I felt essentially the same about conscription and killing as I do now, and I registered only because I wasn't sure of how I would approach you, the draft board, on this subject. Now I believe there is only one course for me to take and that is to tell you I no longer want to have anything to do with the Selective Service System.

If I indicated that I was a "Sole Surviving Son" when I filled out your forms around my 18th birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the second world war. I do not have the specific information

you ask for.

I am sure you will find that this letter answers most of your questions.

Sincerely,

/s/ Jack McKart

(Enclosed with this is a blank SSS Form 150, "Special Form for Conscientious Objector", addressed to Jack Frederick McKart)

(Exhibit page 26)

SELECTIVE SERVICE SYSTEM
Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio

(Letterhead with local board stamp)

June 24, 1964

Jack Frederick McKart
171 Michael Avenue
Hamilton, Ohio

Dear Sir:

In your letter of May 20, 1964 you advised us that your father was killed in World War II. So that all aspects of your case may be considered will you please give us as much as possible of the following information, concerning your father.

Name *PRESTON MONROE McKART*

Date of Birth *sometime in 1918 or 1919*
(He was born in Nashville, Tennessee)

(Don't know exact date)

Date of entry into service *sometime prior to 1943 (Don't know exact date)*

Grade or rank at time of death *SECOND LIEUTENANT (aerial navigator)*

Branch of Service *ARMY AIR CORPS*

Any other information that will assist in identification.
I BELIEVE HE WAS KILLED SOMETIME IN 1944. AGAIN, I DON'T KNOW THE EXACT DATE OR ANY OF THE DETAILS.

Your cooperation will be greatly appreciated. Please use the enclosed envelope which requires no postage.

By Direction of

Local Board No. 9
Butler County, Ohio

/s/ Evelyn C. Junkin
Evelyn C. Junkin
Clerk

6-26-64
Checked with Butler County Veterans Service Representative, he could not give all details but advised the Widow's Pension claim was number

XC-3650835

(Exhibit page 29)

OHIO SELECTIVE SERVICE SYSTEM

Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio

(Typed heading with local board stamp)

July 27, 1964

Jack F. McKart
171 Michael Ave.
Hamilton, Ohio

Dear Sir:

Your order to report for (Preinduction Physical Examination) and (Induction) has been cancelled for the following reason:

You are a student.

You are married.

You are a Father.

You are a member of a Reserve Unit.

xx Other. You are a sole surviving son per Public Law 88-360.

Please continue to keep this board advised of any change in your address, physical condition, occupation, marital, family, dependency or military status.

By Direction of the Board:

A. 26

/s/ Evelyn C. Junkin
(Clerk)

(03-187)

(Exhibit page 33)

1762 North Clark Street
Apt. 39
Chicago, Illinois 60614
March 12, 1966

Selective Service Board No. 9
633 High Street
Hamilton, Ohio

Sirs:

I am writing to let you know that on March 14 I will not appear at your office at 6:30 in the morning as ordered to take an armed forces physical examination. My reasons for not appearing should be clear to you if you will reread the two letters I sent to your office in May of 1964.

/s/ Jack McKart

(Exhibit page 35)

Approval
Not Required.

Selective Service System
DELINQUENCY NOTICE
(SEAL)

Local Board
No. 9
Butler County
633 High St.
Hamilton, Ohio

March 21, 1966
(Date Became Delinquent)

March 22, 1966
(Date of Mailing)

(Local Board Stamp)

SELECTIVE SERVICE NO.
33-9-43-86

TO: Jack Frederick McKart

ADD: 1762 North Clark Street Apt. 39

Chicago Cook Ill. 60614

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Report for preinduction physical examination on March 17, 1966.

2. You are hereby directed to report to thes local board immediately, either in person or by mail.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as $10,000, or by both such fine and imprisonment.

/s/ Eugene A. Erbs
Member or Clerk of
Local Board

SSS Form No. 304 (9-9-60)

DELINQUENT REGISTRANT

Approval Not Required

(Seal)

Selective Service System
ORDER TO REPORT FOR INDUCTION

Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio 45011
(Local Board Stamp)

The President of the United States,

To

Jack Frederick McKart
1762 N. Clark St. Apt. 39
Chicago, Illinois

Mar 31, 1966 (stamp)
(Date of mailing)

SELECTIVE SERVICE NO.
33-9-43-86

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report at Local Board No. 9 Butler County 633 High Street Hamilton, Ohio 45011 on April 21, 1966 at 6:45 AM for forwarding to an Armed Forces Induction Station.

/s/ E.A. Erbs
(Member or clerk of Local Board)

A. 29

IMPORTANT NOTICE

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documsnts are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE - original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD - certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant) - (1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT - affidavits establishing that dependency.

Bring your Social Security Account Number card. If you do not have one, apply at nearest Social Security Administration

Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship,

go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form No. 252 (Revised 11-27-63)

(Exhibit page 37)

1762 North Clark Street
Apt. 39
April 20, 1966 Chicago, Illinois 60614

Selective Service Board No. 9
633 High Street
Hamilton, Ohio

Sirs:

This is to inform you that I refuse to report to your office tomorrow morning as ordered for induction into the armed forces. I cannot allow any government to order me to do something which goes against my conscience, and being conscripted to kill is one of these things.

All I want is to be left alone to live my life as I see fit. I must be the one to decide how my life is to be lived; no other person can make these decisions for me. The only obligation this entails is that I do no harm to any other person, and so long as I harm no one else, no person or government has any right to interfere with my life.

Sincerely,

/s/ Jack McKart

Sincerely,

/s/ Jack McKart

At 12

OPERATIONS BULLETIN NO. 263

National Headquarters
SELECTIVE SERVICE SYSTEM
(Letterhead)

SSS Reg.
1622.40(a)(9)
1630.4 (c)

OPERATIONS BULLETIN NO. 263

ISSUED: AUGUST 14, 1964

SUBJECT: EXEMPTION OF SOLE SURVIVING SONS FROM INDUCTION

1. Section 6(o) of the Universal Military Training and Service Act, as amended on July 7, 1964, by Public Law 88-360 is quoted in Operations Bulletin No. 261.

2. Section 6(o) was amended in three respects: first, to additionally provide where the father of a family has died as a result of his military service, that a registrant who is the sole surviving son of the family shall not be inducted; second, that the registrant by volunteering for induction may waive the exemption afforded him by section 6(o); and third, that the registrant shall not be eligible for that exemption during a period of a war or national emergency declared by the Congress.

3. Whenever a registrant has become qualified for exemption as a sole surviving son under section 6(o), he should not thereafter be deemed to have lost his right to the exemption by reason of any subsequent change in the status of

his family other than the birth of a full brother who is still living.

/s/ Lewis B. Hershey
DIRECTOR

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SELECTIVE SERVICE LETTER TO COUNSEL

National Headquarters
SELECTIVE SERVICE SYSTEM
(Letterhead)

MAR 10 1967

Mr. Arnold Morelli
Bauer, Swain & Morelli
Attorneys at Law
503 Executive Building
35 East Seventh Street
Cincinnati, Ohio 45202

Subject: Jack Frederick McKart SS No. 33-9-43-86

Dear Mr. Morelli:

This is in reply to your letter of February 28, 1967, in which you posed several questions and asked that we send you the legislative history concerning the 1964 amendment to section 6(o) of the Universal Military Training and Service Act, as amended, or furnish you the citation.

Since Operations Bulletin No. 263 was rescinded no further rulings or interpretations concerning section 6(o) have been made, and our office has not issued any other instructions concerning it to local boards. The legislative history

concerning the 1964 amendment may be found in U.S. Code Congressional and Administrative News, 88th Congress - Second Session, 1964, at page 2539.

We feel that Representative Huber expressed the intent of Congress in his remarks made at that time that he submitted the sole-surviving-son amendment to the 1948 Act. He said, (page 2540)"***But under these circumstances, while we are still at peace, I see no reason why we cannot allow these parents to made so costly a sacrifice to have the solace and consolation of having their own remaining son at their side to carry on the family's name."

We hope that the above will be helpful to you.

For the Director,

/s/ Daniel O. Omer
DANIEL O. OMER
General Counsel

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REPORT OF COMMITTEE ON ARMED FORCES

88th Congress 1st Session — HOUSE OF REPRESENTATIVES — Report No.502

EXEMPTION FROM INDUCTION OF SOLE SURVIVING SON OF FAMILY WHOSE FATHER DIED AS RESULT OF MILITARY SERVICE

July 9, 1963 - Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Rivers of South Carolina, from the

Committee on Armed Services, submitted the following

REPORT

(to accompany H.R. 2664)

The Committee on Armed Services, to whom was referred the bill (H.R. 2664) to amend section 6(o) of the Universal Military Training and Service Act to provide an exemption from induction for the sole surviving son of a family whose father dies as a result of military service, having considered the same, report favorably thereon with an amendment and recommend that the bill do pass.

The amendment is as follows:

On page 1, lines 4 and 5, strike out the words "by inserting 'the father or' immediately after 'Where'.", insert a dash after the word "amended", and the following:

(1) by inserting the words "the father or" after the word "Where"; and

(2) by inserting the words "unless he volunteers for induction" after the words "of this title".

The purpose of the proposed legislation, as amended, is to amend section 6(o) of the Universal Military Training and Service Act to provide an exemption from induction for the sole surviving son of a family whose father died as a result of military service.

Under section 6(o) of existing law, if one or more sons or daughters of a family are killed in action or died in line of duty while serving in Armed Forces of the United States or subsequently die as a result of injuries received or disease incurred during such

service, then the sole surviving son of such family may not be inducted.

It will be noted that this exemption from induction is only applicable where a son or daughter dies as a result of active service and then the exemption applies to the remaining son. Existing law does not exempt from induction a sole surviving son whose father died as a result of active service.

In the opinion of the Committee on Armed Services, this exemption should be enlarged to include the latter group of individuals, so long as they are not precluded from volunteering for induction.

The Army, in commenting on the proposed legislation for the Department of Defense, interposed no objection to the proposed legislation provided it is amended to permit voluntary induction. The Army stated in its letter to the chairman:

> If voluntary enlistments are suspended in time of emergency or otherwise, the bill would preclude voluntary, as well as involuntary, induction of the persons affected. Accordingly, such persons would be barred from military service. Therefore, the Department of Defense recommends that the proposal be restricted to involuntary inductions as provided in the inclosed substitute draft bill. To be consistent, the substitute draft bill further amends section 6 of the Universal Military Training and Service Act to permit voluntary induction of the sole surviving son of a family.

where one or more sons or daughters of such family were killed in action or died in line of duty.

The committee adopted the amendment recommended by the Department of the Army.

The Committee on Armed Services unanimously recommends enactment of the proposed legislation, as amended.

The Department of the Army for the Department of Defense, the Bureau of the Budget, and the Selective Service System interpose no objection, as indicated by the following letters hereby made a part of this report.

Summary of H.R. 2664

Purpose of the bill: To provide an exemption from induction for the sole surviving son of a family whose father died as a result of military service.

The bill amends the existing law.

Explanation of the bill: At present exemption from induction is only applicable where a son or daughter dies as a result of active service, and then the exemption applies to the remaining son. Enactment of this legislation will also include the father who dies as a result of military service. Also, enactment will be restricted to involuntary inductions.

Explanation of committee amendments: Existing law does not exempt from induction a sole surviving son whose father died as a result of active service. This amendment will extend exemption to

this group, but permit voluntary induction.

Fiscal data: No cost to the Government.

Departmental data: The Department of the Army for the Department of Defense, the Bureau of the Budget, and the Selective Service System interpose no objection.

Committee position: The Committee on the Armed Services unanimously recommend enactment, as amended.

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GENERAL FINDING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title omitted in printing.)

(Filed May 16, 1967)

This case was tried to the Court, the defendant having waived in writing his right to a jury trial. The general finding of the Court is that the defendant is guilty as charged in the indictment. See Memorandum of Decision filed herein.

/s/ David S. Porter
Judge

MEMORANDUM OF DECISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title omitted in printing.)

(Filed May 16, 1967)

PORTER, J.: Defendant was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act in that he failed to comply with an order of his local board to report for and submit to induction into the Armed Forces of the United States. Title 50 App., Section 462, United States Code. He pleaded not guilty, waived a jury trial, and his case was heard by the Court.

The facts are not in dispute and for the most part may be verified by examining the draft board's file (PX 1).

From this and the testimony, it will be seen that the defendant, whose birthday is February 13, 1943, filled out a questionnaire on his eighteenth birthday. He was not classified until he was twenty years of age. He was classified IA, and, on February 26, 1963, notified accordingly. No appeal was taken.

On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote the first of three or four letters (PX 1A) saying in substance he refused to report and stating his reasons. Briefly, his reasons were that

he did not believe in killing; that the Selective Service System violated his belief; and he therefore refused to have anything to do with it. He also objected to conscription as slavery.

The draft board replied by sending forms for the defendant to fill out if he sought a CO status. It also stated that it was noted that the defendant indicated on his original questionnaire that he was the sole surviving son of a family which had a father, son or daughter killed while serving in the Armed Services and asked for information.

The young man replied under date of May 20, 1964, returning the form and making it clear he did not wish to become classified as a conscientious objector. "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated: "If I indicated that I was a 'sole surviving son' when I filled out your forms around my eighteenth birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

While the defendant did nothing to claim the exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him IVA around July 27, 1964. On February 4, 1966, it came to their attention that the boy's mother had died. After some correspondence with state and national authorities, they classified him IA, and they ordered him to report on February 24, 1966 for a pre-induction physical some time in

March, 1966.

On March 12, 1966, the defendant wrote and said he would not report. On March 31, 1966 he was ordered to report on April 21, 1966 for induction. On April 20, 1966 he wrote a letter explaining that he had no intention of doing so. He did not report on April 21, 1966 and was declared delinquent.

At no time did the defendant appeal any order of the Board, and specifically he did not appeal the order that he report for induction on April 21, 1966.

Of course, he has not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System. The defendant did not take the stand and offered no testimony in his own behalf. Hence, the foregoing statement of facts are not contradicted, and the defense offered in his behalf is strictly legal.

It has three parts: first that he is entitled to a IVA classification as a matter of law as a sole surviving son; second, that his classification as IA by the board was an act in excess of their jurisdiction; and third, he contends that since he is entitled to a IVA classification as a matter of law, he is excused from the requirement that he must exhaust his administrative remedies.

In considering these arguments the case has been treated as if the defendant had claimed the IVA classification. The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to him.

He simply rejected the whole idea of the draft and persisted in this stand when his mother died and the draft board changed his classification to IA.

In an Order denying a motion for an injunction in *Muhammad Ali* v. *Breathitt*, dated April 17, 1967 (No. 17,834, United States Court of Appeals for the Sixth Circuit) the Court said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service."

The Court went on to say:

> "If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the Armed Forces with much-needed personnel."

Much the same common sense reasoning is behind the authorities on which the conclusions of law are based that the defendant cannot raise the legal question he does without first showing that he exhausted his administrative remedies. These cases are *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Sunal* v. *Large*, 332 U.S. 174 (1947); *Cox* v. *United States*, 332 U.S. 442 (1947); *Estep* v. *United States*, 327 U.S. 114 (1946); *Gibson* v. *United States*, 329 U.S. 338 (1946); *Billings* v. *Truesdell*, 321 U.S. 542 (1944); *Falbo* v. *United States*, 320 U.S. 549 (1944). See also,

Pickens v. Cox, 282 F 2nd 784 (10 Cir., 1960).

In *Pickens*, the defendant was inducted into the Army in 1953. In 1954 he was tried before a General Court Martial and sentenced to a dishonorable discharge and confinement for ten years. Pickens petitioned for a writ of habeas corpus on the ground that the Army had no jurisdiction over him because he was a sole surviving son at the time of his induction, though he did not inform his local board of that status and had never applied for a release from the military on that account. The Court held the burden was upon the registrant to bring himself within any exemption specified within the Selective Service Act. Where the Act declares that sole surviving sons "shall not be inducted," this phrase does not create a disability in the Selective Service Board nor deny it the power to induct, but merely creates a personal privilege or right to exemption in the individual. "Exemption from military service is a matter of legislative grace. The burden is upon the registrant to claim and establish the right to exemption and the exemption may be waived or abandoned like any other personal privilege." *Ibid.*, p. 785.

As to the contention that the defendant is entitled to the classification IVA as a matter of law, it should be noted that every defense based on improper classification (in a criminal prosecution under the Selective Service Act) is actually a question of law. When the defense is presented and the trial court is asked

to review the administrative board's decision, and the criterion is whether there was a basis in fact for the decision, and not whether the trial court would have made the decision. In *Cox v. The United States, supra,* the Court held that in a criminal prosecution the jury cannot pass on the validity of an administrative order, the question being one for the court, since it is a question of law and not of fact.

An error of law may be a basis for a defense, but only when the defendant has exhausted his administrative remedies. *Sicurella v. The United States, supra.*

Defendant cites *Estep* in support of his position, but the Court finds this case within the facts of *Falbo* and *Billings*, rather than *Estep*.

It remains only to say on the main point, whether this defendant was required to exhaust his administrative remedies that in Selective Service cases the rule is stricter than it is in other areas of the law, and for good reason, since the idea is to get men into the Army as quickly as possible. Where there is still a chance the Service itself may reject them (as by a physical) then there is no reason for judicial review. Hence, cases involving the futility of administrative remedies in other areas, such as labor law, are not deemed applicable.

This is dispositive and makes unnecessary a consideration of the correctness of the defendant's reclassification following the death of his mother. It should suffice to show why the Court

cannot agree with the contentions of the defendant, and why the Court's general finding is that he is guilty.

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JUDGMENT AND COMMITMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal
	)	Indictment
v.	)	Number
	)	11,122
JACK FREDERICK McKART,	)	
	)	
Defendant.	)	

JUDGMENT AND COMMITMENT

On this 22nd day of June, 1967, came the attorney for the government and the defendant appeared in person and represented by Counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty of the offense of Failure to Report for Induction into the Armed Forces of the United States in violation of Section 462, App. 50, U.S.C.

as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is

guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS.

IT IS ADJUDGED that Stay of Execution is Granted pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ David S. Porter
United States District Judge

The Court recommends commitment to:

_____
CLERK

A True Copy. Certified this ___ day of _____.

(Signed) _____ (by) _____
CLERK DEPUTY CLERK

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NOTICE OF APPEAL

(Filed June 28, 1967)

(Title omitted in printing.)

Name and address of appellant:
Jack Frederick McKart

3430 North Elaine Place
Chicago, Illinois 60657
Apt. No. 11

Name and address of appellant's attorney:

Bauer, Swain & Morelli
503 Executive Building
Cincinnati, Ohio 45202

Offense: 50 App. U.S.C., § 462

Defendant was found guilty and sentenced to three years in jail on June 22, 1967.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the above-stated judgment.

Dated June 28, 1967.

/s/Arnold Morelli
Arnold Morelli of
Bauer, Swain & Morelli
Appellant's Attorney

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OPINION OF THE SIXTH CIRCUIT
COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	Appeal from
	)	the United
Plaintiff-	)	States Dis-
Appellee,	)	trict Court
	)	for the
v.	)	Southern
JACK FREDERICK McKART,	)	District of
	)	Ohio, West-
Defendant-	)	ern Division
Appellant.	)	

Decided June 14, 1968.

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

PHILLIPS, Circuit Judge. This case arises out of the failure and refusal of Jack Frederick McKart to comply with an order of his local draft board to report for and submit to induction into the Armed Forces of the United States. He was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act. 50 U.S.C. App. §462. He waived a jury trial, was found guilty by the District Judge and was sentenced to a prison term of three years.

McKart's indictment and trial were preceded by a long and somewhat complicated history of dealings with his local draft board. He was born February

13, 1943. Shortly after his eighteenth birthday he completed and filed his Selective Service questionnaire. His local board classified him I-A and notified him accordingly on February 26, 1963. McKart made no attempt to appeal his classification.

On March 23, 1964, he was ordered to report for a pre-induction physical examination on April 21. He failed to report. On May 1, 1964, the draft board ordered him to report for induction on May 11. Again he failed to report. Instead he wrote a letter stating his refusal to submit to induction and expressing his total antipathy for the Selective Service System. He said that he did not believe in killing; that the Selective Service System violated his beliefs; and that he therefore refused to have anything to do with it. He objected to conscription as slavery, stating: "I refuse to serve this country armed, and I refuse to serve it unarmed by doing alternative service."

The draft board replied by furnishing McKart the special form for conscientious objector and suggesting that he complete the form and return it. The board also stated in its letter that McKart's original questionnaire had indicated that he was the sole surviving son of a family of which one or more members were killed in action or died in the line of duty, and asked for further information. On May 20, 1964, McKart returned the blank form to the board making it clear that he did not wish to become classified as a conscientious objector, saying: "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he

stated:

> "If I indicated that I was a 'Sole Surviving Son' when I filled out your forms around my eighteenth birthday; then I made a mistake. I do not even have any brothers and sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

Although McKart did nothing to claim an exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him IV-A. From July 27, 1964, until February 14, 1966, McKart remained in the IV-A classification.

Early in 1966 the board learned of the death of McKart's mother. His classification was changed from IV-A to I-A. When McKart was informed of this reclassification, he made no effort to appeal. Subsequently he was ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966. He failed to comply with either of these orders.

At the trial McKart attempted to defend his refusal to report for induction on the ground that he still is entitled to a IV-A classification as a sole surviving son under 50 U.S.C. App. § 456(o). In a well-reasoned memorandum opinion, District Judge David S. Porter held that the failure of McKart to exhaust his administrative remedies within the Selective Service System barred him from raising the validity of his classification as a defense in the criminal proceeding. Judge Porter said:

"Of course, he had not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System.

* * * * * * * * *

"...The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to him. He simply rejected the whole idea of the draft..."

On appeal McKart's theory is that a Selective Service registrant is not required to exhaust his administrative remedies when the issue of classification is purely one of law and the position of the Selective Service is so well established that an appeal would be futile.

The issue before us is this: When a Selective Service registrant who has not appealed his classification through the Selective Service prodedures is tried for failure to submit to induction into the Armed Forces, may the registrant raise the defense, upon wholly undisputed facts, that he was wrongfully classified in violation of statute? We answer this question in the negative and affirm the conviction.

In *Falbo v. United States*, 320 U.S. 549, the defendant, a conscientious objector, was tried for willful failure to report for assignment to work of national importance. Falbo defended on the ground that he was entitled to a statutory exemption from all forms of national service. The defendant Falbo challenged the order of his local board before he had exhausted his administrative remedies. The Supreme Court held that Falbo could

not raise this defense. After the decision in *Falbo*, many courts held that, even after exhaustion of administrative remedies, a registrant could not defend a criminal prosecution on the ground that the board lacked jurisdiction to impose the classification. Indeed, most courts held that judicial review of an erroneous classification could be had only in a habeas corpus proceeding after induction.

In *Estep v. United States*, 327 U.S. 114, the Supreme Court held that the defense of an invalid classification may be raised in a criminal prosecution where the registrant has exhausted all administrative remedies, reported for induction, was accepted, but refused to submit to induction. In *Estep* the Court emphasized that the defendant in *Falbo* had not exhausted his administrative remedies:

> *"Falbo v. United States, supra*, does not preclude such a defense in the present cases. In the Falbo case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." 327 U.S. at 123.

The requirement that judicial review of a registrant's classification must await both the full exhaustion of administrative remedies and acceptance for induction is founded on the policy of mobilizing national manpower in the shortest practicable period. *Falbo v.*

United States, *supra*, 320 U.S. 549, 554. Until the registrant reports and iss accepted for induction there is always the possibility that he may be rejected because of his physical condition or perhaps an erroneous classification may be changed. In *United States v. Irons*, 369 F2d 557, 558-59 (6th Cir.), Judge Mathes said:

> "Not only did appellant spurn all administrative remedies available to him, including appeal [cf. *Maddox v. United States*, 264 F 2d 243 (6th Cir. 1959)[; he also refused to report for, or submit to a physical examination. Conscientious objectors are not excused from a physical examination. Indeed, no registrant is, and for good reason. [See Selective Service Regs. § 1628.11, 32 C.F.R. § 1628.11 (1965 Supp.)] Even if improperly classified I-A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as IV F. Where that is the result, all constitutional and other problems incident to I-A clasiification disappear of course, *eo instanti*. [See: *Falbo v. United States*, 320 U.S. 549, 553, 64 S. Ct. 346, 88 L.Ed. 305 (1944); *Moore v. United States*, 302 F. 2d 929 (9th Cir. 1962); *United States v. Balogh*, 160 F2d 999 (2nd Cir. 1947).]
>
> "The same policy requires every registrant to report for induction as ordered, even though he may have valid legal grounds for refusing to submit to induction. [Cf.: *Estep v. United States*, *supra*, 327 U.S. 114, 66 S.Ct. 423; *Williams v. United States*, 203 F. 2d, 85, 88 (9th Cir. 1953).]"

Accord, *Moore v. United States*, 302 F. 2d 929 (9th Cir.); *Breen v. Selective Service Board*, --- F. Supp. ---, 36 U.S.L.W. 2597 (D. Conn.).

In support of the view that the administrative remedies need not be exhausted before the validity of a classification is subject to judicial review, appellant relies on the cases of *Wills v. United States*, 384 F.2d 943 (9th Cir.), cert. denied --- U.S. ---; and *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir.).

In *Wills* a registrant was permitted in a criminal proceeding to attack his reclassification without first exhausting his remedies of appeal within the Selective Service System. The local draft board did not mail the registrant his notice of delinquency until long after the expiration of the ten day period for appeal from his subsequent reclassification. The reclassification was found to be not in accordance with the procedure contemplated by the regulations. The Ninth Circuit held that "Knowledge of his delinquency status and impending induction would thus be relevant to appellant's decision whether to appeal, and the board's failure to disclose this fact at the proper time cannot be said to be without consequence to that decision."

In *Wolff* two college students were reclassified from II-S to I-A because they participated at the offices af a Selective Service board in a protest against American involvement in Vietnam. The two students sought to enjoin their local board from reclassifying them. In approving the injunction against the

board, the Second Circuit summarized the basis of its action as follows:

> "The two local boards did act without jurisdiction, the record shows that attempts to secure relief within the Selective Service System would be futile, and the threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt action by the courts to avoid an erosion of these precious constitutional rights. Under this combination of circumstances an injunction could properly issue." 372 F.2d at 820.

Relying upon the rationale of *Dombrowski v. Pfister*, 380 U.S. 479, the Court held that injunctive relief prior to the exhaustion of administrative remedies was warranted because the effect of the reclassification was to curtail immediately the exercise of the First Amendment rights.

It is apparent that the principles applied in *Wills* and *Wolff* are inapplicable to the present case. In making his decision whether to appeal McKart was neither stifled nor misled by the action of his board. Nor does McKart purport to show that his classification by the board was undertaken as an attempt to curtail the exercise of his freedom of speech or any other Constitutional right.

We do not pass upon the question as to whether McKart would have been entitled to a IV-A classification under 50 U.S.C. § 456(o) if he had exhausted his admini-

strative remedies.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting: Regretfully I cannot agree with the conclusion of my brethren in this case. It is clear that the Defendant had every intention to violate the Selective Service Act, but the fact is that he had no duty under any "directions made pursuant to" the Act that he could be guilty of failing to perform.

Defendant was indicted and tried for failing "to comply with an order of his local board to report for and submit to induction..." Section 456(o) of Title 50, App., provides that "...the sole surviving son of such family /the father of which was killed in action/ *shall not* be inducted..." (emphasis added). The local board recognized at one time that the Defendant came under this exemption. When the Defendant's mother died, the board decided that the exemption no longer applied because, in their opinion there was no family left. In my view, that decision was contrary to the clear wording of the statute and to the clear intent of Congress in providing for the exemption. Hence, I conclude that the board's order of induction was not "pursuant to" the Act but in contravention of the Act. Therefore, I can only conclude that regardless of how much he tried, and perhaps even wanted, to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried.

This is not a case where the existence of the exemption depends upon the board's first making a factual determination.

Here the board had already determined that the Defendant was entitled to the exemption; the termination of that exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.

I would reverse and dismiss the indictment.

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JUDGMENT OF THE APPELLATE COURT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,194

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK FREDERICK McKART,

Defendant-Appellant.

JUDGMENT

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the

record from the United States District Court for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

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ORDER GRANTING CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968
No. 403

JACK FREDERICK McKART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER ALLOWING CERTIORARI. Filed October 28, 1968.

The petition herein for a writ of

certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

NOTICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL

If this classification is be a local board, you may, within 10 days after the mailing of this notice, file a written request for a personal appearance before the local board (unless this classification has been determined upon such a personal appearance). Following such personal appearance you may file a written notice of appeal from the local board's classification within the applicable period mentioned in the next paragraph after the date of the mailing of the new notice of classification. If you do not wish a personal appearance but do want to appeal your case, you may do so by making such an appeal in writing, within the specicied time.

Appeal from classification by local board may be taken by filing written notice of appeal with local board within one of the following periods after date of mailing of this notice, whichever is applicable: 10 DAYS, if both registrant and local board are located in the continental United States; 30 DAYS, if registrant is located in the continental United States and local board is located in the State of Alaska, the State of Hawaii, or a possession of the United States; 30 DAYS, if registrant is located in the State of Alaska, the State of Hawaii, or a possession of the United States and local board is located in another State of possession or in the District of Columbia; 30 DAYS, if the registrant is located in Canada, Cuba or Mexico; 60 DAYS, if registrant is locat-

ed in any other foreign country. If the appeal involves a claim for occupational deferment, you may file with the local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which your principal place of employment or residence is located.

If an appeal has been taken, and one or more members of the appeal board dissented from such classification, you may file a written notice of appeal to the President with your local board within 10 DAYS after the mailing of this notice.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD.

SSS Form 110 (Rev. 5-25-67)
All other forms are obsolete.

(Printed on the reverse side of Notice of Classification; approximate size, 3½ inches by 2¾ inches).

(Plaintiff's Exhibit 1)
June 24, 1966
(Selective Service System Letterhead)

In reply refer to: 5-8q

Local Board No. 9
Butler County
Hamilton, Ohio

Subject: McKART, Jack
Frederick SS No. 33-
9-43-86

Gentlemen:

We requested review of this case at National Headquarters for their opinion as to whether or not this registrant may qualify as a sole surviving son. We are advised that inasmuch as there is no family, it is not believed that the registrant would qualify for sole surviving son status.

We have forwarded Delinquent Registrant Report (SSS Form 301), provided by your local board, the United States Attorney. Please enter a record of mailing this form on the Classification Questionnaire.

The cover sheet is returned, please acknowledge receipt.

For the state Director

/s/Sinclair Russell,Jr.
SINCLAIR RUSSELL, JR.
Lt. Colonel, USAF
Chief, Field Division

Enclosure - Cover Sheet

Plaintiff's Exhibit 1
(Selective Service System Letterhead)

State Director of Selective Service
34 North High Street
Columbus, Ohio

Subject: Jack
Frederick McKart
SS No. 33-9-43-86
Your File: 5-8f

Dear Colonel Clouse:

Attached is the registrant's Selective Service file that was received with your letter of 10 May 1966.

Inasmuch as there is no family, it is not believed that he qualifies for sole surviving son status.

In determining whether any registrant is a sole surviving son, an official statement of service and a death report, together with a chronology of the family happenings, beginning with the marriage of the parents, help to remove assumptions that otherwise have to be made.

For the Director

/s/ Kenneth S. Goodrich
KENNETH S. GOODRICH
Captain, USNR
Chief, Manpower
Division

Attach.

(Plaintiff's Exhibit 1)

May 10, 1966
(Selective Service System Letterhead)

In reply refer to:
5-8f

Director Selective Service System
1724 "F" Street, N.W.
Washington, D.C.

Subject: McKART, ack
Frederick
SS No. 33-9-
43-86

Dear General Hershey:

This registrant states that he had no brothers or sisters, and information is entered in the Cover Sheet verifying that his father died while in service in W.W.II of wounds received in combat. Information is also furnished confirming the death of the registrant's mother on January 30, 1966. Inasmuch as there is no family unit, a question has arisen as to whether or not this registrant continues to qualify for classifiaction as a Sole Surviving Son.

We are forwarding the Cover Sheet for your review, and will appreciate your advice.

Very truly yours,

R.E. C OUSE
Colonel, AUS, (Ret.)
The State Director

Enclosure: Cover Sheet
66